NO. 85-1351

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

DOLORES BODD CASACELI, Individually and As Duly Authorized Representative of the Estate of Joseph Stanley Bodd,
and EVELYN BODD,

Petitioners

VERSUS

CHERAMIE BO TRUC #11, INC., and TRANSOCEAN CONTRACTORS, INC.,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

Did the Court of Appeals violate petitioners' Seventh Amendment right to a trial by jury by failing to use the proper standard of appellate review in reversing the jury verdict on the basis that the evidence was insufficient to support the verdict?

Did the Court of Appeals err in finding the evidence insufficient to support the jury's conclusion that respondent, Cheramie Bo Truc #11, Inc., was negligent?

Did the Court of Appeals err in finding the evidence insufficient to support the jury's conclusion that respondent, Transocean Contractors, Inc., was negligent?

TABLE OF CONTENTS

Questions Presented.....i
Table of Contents.....ii
Table of Authorities.....iii
Opinions Below.....1
Jurisdiction.....3
Constitutional Provisions and Federal Statutes.....3
Statement of the Case.....4
Argument.....9

I. Did the Court of Appeals Violate Petitioners' Seventh Amendment Right to a Trial by Jury By Failing to use the Proper Standard of Appellate Review in Reversing the Jury Verdict on the Basis that the Evidence was Insufficient to Support the Verdict?.....9

II. Did the Court of Appeals Err in Finding the Evidence Insufficient to Support the Jury's Conclusion That Respondent, Cheramie Bo Truc #11, Inc., Was Negligent?.....13

III. Did the Court of Appeals Err in Finding the Evidence Insufficient to Support the Jury's Conclusion that Respondent, Transocean Contractors Inc., Was Negligent?.....22

Conclusion.....28
Certificate of Service.....29

APPENDIX A.....A-1
APPENDIX B.....A-7
APPENDIX C.....A-14
APPENDIX D.....A-34

TABLE OF AUTHORITIES

Cheek V. Williams-McWilliams, 697 F.2d 649 (1983).....9

Daigle V. Point Landing, Inc., 616 F.2d 825 (1980).....25

Gross V. Black & Decker (U.S.), Inc., 695 F.2d 585 (1983).....10

Moragne V. State Marine Lines, Inc., 398 U.S. 375 (1970).....5

Morein V. Reading & Bates Drilling Co., Et Al, Fifth Circuit No. 83-4768 (1984).....21

Scindia Steam Navigation Co. V. De Los Santos, 451 U.S. 156 (1981).....5,19,20,21

U.S. V. Mowbray's Floating Equipment, 601 F.2d 645 (1979).....26

Seventh Amendment to the U.S. Constitution.....3

33 U.S.C. §905(b).....3,4

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OPINIONS BELOW

The judgment of the jury in the United States District Court for the Western District of Louisiana in the case entitled "Dolores Bodd Casaceli, et al v. Martech International, Inc., et al" bearing Civil Action No. 80-0097, consolidated with "Dolores Bodd Casaceli, et al v. Cheramie Bo Truc #11, Inc." bearing Civil Action No. 80-0098, dated April 12, 1984, is not reported, but is reprinted in the Appendix hereto, Pages A-1—A-6, infra.

The ruling by the United States District Court for the Western District of Louisiana on the post-trial motions filed by respondents in the case entitled "Dolores Bodd Casaceli, et al v. Martech International, Inc." bearing Civil Action No. 80-0097, consolidated with "Dolores Bodd Casaceli, et al v. Cheramie Bo Truc #11, Inc." bearing Civil Action No. 80-0098, dated June 22, 1984, is not reported, but is reprinted in the Appendix hereto, Pages A-7—A-13, infra.

The Opinion of the United States Court of Appeals for the Fifth Circuit in the case entitled "Dolores Bodd Casaceli, , Individually and as Representative of Succession of Joseph Stanley Bodd, etc, v.Martech International, Inc., Transocean Contractors, Inc. and Cheramie Bo Truc #11, Inc." Opinion No. 84-4452 dated October 29, 1985, is not reported, but is reprinted in the Appendix hereto, PagesA-14—A-33, infra.

The denial of petitioners' Petition for Rehearing by the United States Court of Appeals for the Fifth Circuit in the case entitled "Dolores Bodd Casaceli, Individually and as Representative of Succession of Joseph Stanley Bodd, etc. v. Martech International Inc., Transocean Contractors, Inc. and Cheramie Bo Truc #11, Inc." No. 84-4452, dated December 11, 1985, is not reported, but is reprinted in the Appendix hereto, Pages A-34—A-35, infra.

JURISDICTION

The Opinion of the Court of Appeals for the Fifth Circuit was filed on October 29, 1985, and a copy of the opinion is attached to this petition in the Appendix. The denial of petitioners' Petition for Rehearing was entered by the Court of Appeals for the Fifth Circuit on December 13, 1985, and a copy of the denial is attached to this petition in the Appendix. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND FEDERAL STATUTES

Seventh Amendment, United States Constitution:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Title 33 U.S.C. §905(b):

> "In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to

the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter."

STATEMENT OF THE CASE

On August 12, 1978, Joseph Bodd, an employee of Martech International, Inc., drowned while attempting underwater repairs to the propellors of a vessel owned by respondent, Cheramie Bo Truc #11, Inc. (Cheramie). At the time of his accident, Joseph Bodd was working in a slip owned and operated by respondent, Transocean Contractors, Inc. (Transocean).

Dolores Bodd Casaceli, the representative of Bodd's estate, and Evelyn Bodd, Joseph Bodd's mother, sued Cheramie and Transocean alleging both Cheramie and Transocean were liable for the death of Joseph Bodd. The suit alleged that Cheramie and Transocean were guilty of ordinary negligence and gross negligence. Compensatory and punitive damages were sought against both Cheramie and Transocean.

The jurisdiction against the owner of the vessel, Cheramie, was based on 33 U.S.C. §905(b). Petitioners argued to the jury that the vessel owner, Cheramie, violated all three of the duties owed Joseph Bodd, as enunciated by this court

in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981).

The jurisdiction against the owner of the slip, Transocean, was based upon the general maritime law. See *Moragne v. State Marine Lines, Inc.*, 398 U.S. 375 (1970). Petitioners argued to the jury that the slip owner, Transocean, violated several duties owed Joseph Bodd under the general maritime law.

After a trial on the merits before a jury, the jury returned a verdict and answered special interrogatories propounded to it. The jury found that both Cheramie and Transocean acted in gross and wanton disregard of the safety of Joseph Bodd and awarded petitioners both compensatory and punitive damages. A judgment was entered by the trial court which recited the findings of the jury. See Appendix, Pages A-1—A-6, infra.

After the judgment, both Cheramie and Transocean filed lengthy post-trial motions with the trial judge. Both parties moved for judgments notwithstanding the verdict, in the alternative, a new trial, and in the further alternative, remittitur. With the exception of the motion for remittitur of the award for loss of society, the trial judge denied all post-trial motions in an eight page decision signed on June 22, 1984. See Appendix, Pages A-7—A-13, infra. A reading of the trial judge's ruling shows that all post-trial motions were carefully considered and that the trial judge was not reluctant to grant relief when he felt the evidence was insufficient to support the jury's verdict. After consideration, the trial judge concluded that the evidence was sufficient to support the jury's conclusion that Cheramie and Transocean were both guilty of ordinary negligence and gross negligence.

In an October 29, 1985 opinion, the Court of Appeals for the Fifth Circuit reversed the verdict of the jury and the judgment of the trial judge and held that the evidence was insufficient to support even a finding of ordinary

negligence against either Cheramie or Transocean. The issues of gross negligence and punitive damages were not even addressed by the Court of Appeals.

A careful reading and analysis of the Court of Appeals' Opinion is *critical* to an understanding of the questions presented in this Petition. The Court of Appeals' Opinion is divided into six sections and each section contains a different analysis by the Court of Appeals. It is easy to identify each section of the Opinion because the Court of Appeals has labeled the sections by Roman Numerals I through VI. An identification and summary of the contents of each section of the Opinion is helpful to an understanding of the questions presented in this Petition, and will therefore be set forth below. Petitioners respectfully invite the Court to read the following summary of the analysis occurring in each section of the Court of Appeal's Opinion and then turn to and read the actual language contained in the corresponding language of the opinion, to determine that the following summary accurately reflects the analysis contained in each section:

A) Section I -- In this section of the Opinion, the Court of Appeals sets forth a summary of its understanding of the facts in the case. See Court of Appeals Opinion, Pages 358-360, reproduced in the Appendix at Pages A-16—A-19, infra.

B) Section II -- In this section of the Opinion, the Court of Appeals reviews the proceedings occurring in the District Court. See Court of Appeals Opinion, Page 360, reproduced in the Appendix at Page A-19, infra.

C) Section III -- In this section of the Opinion, the Court of Appeals discusses the statutes and jurisprudence which define and govern the various duties owed by a vessel owner to a person engaged in longshoring or ship-repair work on the vessel. See Court of Appeals Opinion, Pages 360-364,reproduced in the Appendix at Pages A-19—A-25, infra.

D) Section IV -- In this section of the Opinion, the Court of Appeals addresses the law applicable to the duty of the slipowner, Transocean, under the general maritime law. See Court of Appeals Opinion, Pages 364-365, reproduced in the Appendix at Pages A-25—A-27,infra.

E) Section V -- This section of the Opinion is most important to the questions presented in this Petition. After setting forth the proper standard by which the "sufficiency of the evidence" is to be judged, the Court of Appeals subdivides Section V into "A" and "B". Section V(A) appears to be an analysis of the "sufficiency of the evidence" in the record to support the jury's verdict against the vessel owner, Cheramie. See Court of Appeals Opinion, Pages 365-369, reproduced in the Appendix at Pages A-27—A-32, infra. Section V(B) appears to be an analysis of the "sufficiency of the evidence" in the record to support the jury's verdict against the slip owner, Transocean. See Court of Appeals Opinion, Page 369, reproduced in the Appendix at Pages A-32—A-33, infra.

F) Section VI -- In this section of the Opinion, the Court of Appeals restates its conclusion that: "The evidence is not sufficient to support the verdicts against either appellant." See Court of Appeals Opinion, Pages 369-370, reproduced in the Appendix at Page A-33, infra.

As stated above, the language of the Court of Appeals' decision that addresses itself to the sufficiency of the evidence to support the jury's conclusion of negligence is found in Section V of the Opinion. This writer has painstakingly analyzed and counted each sentence appearing in Section V of the Opinion. Section V contains 73 sentences. With the exception of one sentence, *none of the 73 sentences in Section V of the Opinion addresses* any facts or inferences which might support the jury's finding that both Cheramie and Transocean were negligent. Instead, 72 out of the 73 sentences appearing in Section V either:

1) state conclusions of law; or

2) discuss facts which would support a conclusion that Cheramie and Transocean were *not* negligent; or

3) discuss facts which would support a finding of negligence as to Joseph Bodd; or

4) discuss inferences drawn from facts to support conclusions made about the knowledge or lack of knowledge on behalf of Cheramie or Transocean; or

5) discuss inferences drawn from facts to support conclusions made about the knowledge or lack of knowledge of Joseph Bodd.

If the questions presented in this Petition are to be fairly reviewed, then this Court must examine each sentence in Section V of the Opinion in order to determine whether that sentence fits into one of the five categories set forth above or whether that sentence addresses itself to the sufficiency of the facts or inferences which might support the jury's finding of negligence. If this analysis is performed and this Petition denied, then justice will have been served. If this analysis is not performed and this Petition denied, then a grave injustice will have been done to petitioners.

In Section I of the Court of Appeals' Opinion, the Court states its appreciation of the facts. Petitioners submit that the record contains many facts which would support the jury's finding of negligence that do not appear in Section I of the Opinion. However, it is not necessary that this Court have these additional facts before it to fairly decide the questions presented in this Petition. If the facts recited by the Court of Appeals in Section I of its Opinion are fairly analyzed using the proper standard of appellate review, it is clear that these facts alone are sufficient to sustain the jury's verdict.

ARGUMENT

Review by this Court is necessary because the Court of Appeals for the Fifth Circuit blatantly substituted its opinion for that of the jury's and effectively denied petitioners their Seventh Amendment right to a trial by jury. The opinion of the Court of Appeals does not contain any language to demonstrate that it was attempting to follow the traditional standard of appellate review in reversing the verdict of the jury below. This total disregard for the proper standard of appellate review is a gross departure from the usual course of appellate judicial review and warrants an exercise of this Court's power of supervision. Even though petitioners strongly disagree with the result reached by the Court of Appeals, it is not for this reason that this Court should review the Opinion of the Court of Appeals. Even if the result would be the same, this Court should review the Opinion of the Court of Appeals because of the manner in which the Court of Appeals reached its decision. If allowed to stand in its present form, the Opinion of the Court of Appeals will create a dangerous precedent and stand as an open invitation to all unsuccessful litigants to attempt to re-litigate adverse factual findings by the trial court in the Court of Appeals.

I. DID THE COURT OF APPEALS VIOLATE PETITIONERS' SEVENTH AMENDMENT RIGHT TO A TRIAL BY JURY BY FAILING TO USE THE PROPER STANDARD OF APPELLATE REVIEW IN REVERSING THE JURY VERDICT ON THE BASIS THAT THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT?

In admiralty cases, conclusions of negligence and proximate cause are treated as fact questions. This principle was addressed in *Cheek v. Williams-McWilliams*, 697 F.2d 649 (1983), where the court stated:

> "Questions of negligence and proximate cause in admiralty cases are treated as fact questions. Marcona Corp. v. Oil Screw Shifty III, 615 F. 2d 206, 208 (5th Cir. 1980); S.C. Loveland, 608 F.2d at 166." 697 F.2d at 649.

The proper standard of appellate review of facts has been addressed many times by this Court. It has been repeatedly held that findings of fact by the trial court will not be disturbed if supported by sufficient evidence in the record. The decision of the court in *Gross v. Black & Decker (U.S.), Inc.*, 695 F.2d 585 (5th Cir.1983)., contains an excellent description of the proper role of an appellate court in reviewing findings of fact. In **Gross**, the court stated:

> "This Court affords great deference to jury findings. The Seventh Amendment to the Constsitution provides that no fact tried by a jury shall be re-examined by any court of the United States except according to the rules of common law. *For that reason, an appellate court may not reweigh the evidence or set aside the jury's verdict merely because the appellate judges could have drawn different inferences or conclusions from the evidence, or feel that other results might be more reasonable.* Boeing, 411 F.2d at 376 N. 16; Gallick v. Baltimore & Ohio Railroad Co., 372 U. S. 108, 83 S. Ct. 659, 9 L.Ed.2d 618 (1963); Sentilles v. Inter-Carribean Shipping Corp., 361 U.S. 107, 80 S.Ct. 173, 4 L.Ed. 2d 142 (1959). Thus, *the most an appellate court can do is to determine whether there was any competent and substantial evidence in the record which fairly tends to support the verdict.* Mortenson v. United States, 322 U.S. 369, 64 S.Ct. 1037, 88 L.Ed. 1331 (1944). An appellate court will not overturn a jury's verdict then, even though contradictory evidence has been presented, if there is any evidentiary basis for the verdict." 695 F.2d at 865 (emphasis added).

It is clear that in reviewing findings of fact of a jury, an appellate court should concern itself with determining "whether there was any competent and substantial

evidence in the record which fairly tends to support the verdict."

The essence of this petition lies in the fact that the Court of Appeals failed to identify and examine the facts which tend to support the verdict. Rather, the Court of Appeals sought out facts which support respondents' version.

If an opinion of an appellate court reverses a finding of fact without attempting to identify and evaluate the sufficiency of the evidence presented that might support the finding, then the only conclusion is that the appellate court is not following the proper standard of appellate review.

If the October 29, 1985 opinion is read with the above principles in mind, the conclusion is inescapable that the Court of Appeals did not follow the proper standard of appellate review in arriving at its decision. After stating on Page 366 of the opinion that "the record contains no evidence of negligence sufficient to sustain the jury's verdict" against Cheramie, the Court spends the next three pages of the opinion explaining how it reached tha conclusion. See Appendix, Pages A-27—A-32, infra. Petitioners request that this Court examine that language and find any language that addresses itself to the issue as to whether there was sufficient evidence to support the jury's finding. With the exception of one sentence,[1] this discussion contains absolutely no language discussing the lack of evidence to support the jury's finding. Instead of addressing the sufficiency of the evidence which might support a conclusion that Cheramie was negligent, the Court of Appeals:

---

[1]On Page 367 of the opinion is found the following statement: "The record contains no evidence that any vessel passed by the Transocean slip during or around the time of Bodd's final dive." See Appendix, Page A-28, infra.

(1) Discusses facts which would support a conclusion that Cheramie was not negligent;

(2) draws inferences from facts to support conclusions made about the knowledge or lack of knowledge of Cheramie;

(3) states conclusions of law;

(4) discusses facts which would support a finding of negligence on the part of Joseph Bodd; and

(5) draws inferences from facts to support conclusions made about the knowledge or lack of knowledge of Joseph Bodd.

In one single paragraph on Page 369 of the opinion, the Court of Appeals discusses the evidence it considered in arriving at the conclusion that there was insufficient evidence to support the jury's finding of negligence on behalf of Transocean. See Appendix, Page A-32, infra. Again, petitioners request that this Court examine that language and point out any language that addresses itself to the issue as to whether sufficient evidence exists in the record from which a jury could infer that Transocean was negligent. This issue was not addressed. Instead, the Court of Appeals:

(1) makes conclusions of law;

(2) draws inferences from the facts to support conclusions made about the knowledge or lack of knowledge of Transocean;

(3) discusses facts which might support a conclusion that Transocean was not negligent; and

(4) discusses facts which would support a finding of negligence as to Joseph Bodd, and makes inferences from facts to support conclusions about the negligence of Joseph Bodd.

Simply put, the language of the opinion demonstrates the Court of Appeals reweighed the evidence and substituted its conclusions for those of the jury. This fundamental error has resulted in petitioners being effectively denied their Seventh Amendment right to a trial by jury. If the language in Section V of the Opinion is carefully examined, there can be no other conclusion but that the Court of Appeals merely decided the case differently than the jury and then attempted to justify its decision with facts and inferences that would support a different conclusion than that reached by the jury. This total disregard for the proper standard of appellate review is a gross departure from the usual course of conduct by an appellate court and warrants an exercise of this Court's power of supervision.

The remainder of this brief will attempt to identify the facts and evidence supporting the verdict which were identified in Section I of the Opinion, but not addressed by the Court of Appeals in Section V of its Opinion. See Appendix, Pages A-16—A-19, infra. The Court is asked to keep an open mind in reviewing these facts, as the Court of Appeals' reversal of the jury's mandate affects Joseph Bodd's survivors greatly.

II. DID THE COURT OF APPEALS ERR IN FINDING THE EVIDENCE INSUFFICIENT TO SUPPORT THE JURY'S CONCLUSION THAT CHERAMIE WAS NEGLIGENT?

It is not the intention of petitioners to convince this Court that Cheramie was negligent. The evidence supporting the conclusion that Cheramie was *not* negligent has already been thoroughly discussed and set forth in the Court of Appeals' Opinion. See Appendix, Pages A-27—A-32, infra. However, as was discussed in the foregoing section, the Opinion does not contain any language to suggest that the Court of Appeals has evaluated the evidence to see if it is clearly sufficient to support the

jury's conclusion that Cheramie was negligent. If the record is evaluated only to determine whether it reasonably supports the jury's finding of negligence, then the judgment against Cheramie would be reinstated.

While the facts are conflicting, there are certainly enough facts both in the record and in the Court of Appeals' Opinion to conclude that Cheramie may have been negligent. Before addressing the matter as to how the facts recited by the Court of Appeals support a finding of negligence, it would be helpful to lists the facts upon which the jury could reasonably have relied in reaching its conclusion that Cheramie was negligent. To keep matters simple, only facts listed in this Court's October 29, 1985 opinion will be evaluated. It is also important to discuss the reasonable inferences or conclusions the jury could have drawn from knowledge of these facts. After each fact is set forth below, a discussion of the reasonable inferences which the jury might have drawn from knowledge of that particular fact will immediately follow. The pertinent facts and reasonable inferences are:

FACT NO. 1:

"Joseph Bodd, an employee of Martech International, Inc. (Martech), worked as a diver's tender on board the Cheramie Bo-Truc #11 for the two weeks prior to August 12, 1979." (Opinion Page 358, reproduced in Appendix, Page A-16, infra.)

The jury could very well have concluded from this fact that Cheramie had knowledge of the fact that Bodd was inexperienced, because of Cheramie's past dealings with Bodd. Perhaps the jury concluded that Cheramie knew Bodd was merely a diver's helper who was inexperienced and making his debut as a diver. This inference is certainly reasonable and would be relevant in evaluating the negligence of Cheramie.

FACT NO. 2:

> "While backing into the Transocean slip, the right propellor of the Bo-Truc became fouled and the starboard engine shut down. The captain docked the vessel by using the port engine." (Opinion Page 358, reproduced in Appendix, Page A-17, infra.)

Despite this fact, Captain Gaspard was still able to dock the vessel with the use of the port engine only. The jury could easily have concluded from this fact that Captain Gaspard knew the vessel was capable of being moved after one of its propellors became fouled and one engine shut down.

FACT NO. 3:

> "The slip contained a great deal of junk and debris." (Page 358) "The owners of the Cheramie knew the slip water was muddy and that debris was floating in the slip." (Opinion Page 358, reproduced in Appendix, Page A-17, infra.)

The crew of the Cheramie had been working with divers in the two-week period before Bodd's accident. The Captain and crew were not strangers to divers and their equipment. One need not be an expert diver to realize that it is dangerous for a diver to allow his air hose to get tangled in debris. The jury could have concluded that the Captain of the vessel either knew or should have known that the Transocean slip was not a safe place to attempt underwater repairs.

FACT NO. 4:

> "Although Captain Gaspard recommended drydocking the Bo-Truc for repairs, his supervisors decided to contract with Martech for a diver to free the propellor. Martech sent Joseph Bodd and a diver's tender, Thomas Runnels, to perform the contract." (Opinion Page 358, reproduced in Appendix, Page A-17, infra.)

Why did Captain Gaspard recommend to his superivsors that they move the boat out of the Transocean slip and dry-dock it for repairs when the Martech office and divers

were 100 feet away? This question was never addressed in the Court's opinion. While several conclusions are possible, it is submitted the jury may reasonably have concluded that Gaspard recommended dry-docking the boat because he recognized that the deplorable condition of the Transocean slip would not allow for safe and efficient underwater repair. *Furthermore, the fact that he was recommending the vessel be moved and dry-docked for repairs certainly supports the conclusion that the Captain knew the vessel could be moved with only the use of the port engine.* What inference could the jury have drawn from knowledge of the fact that Gaspard's recommendation to dry-dock the vessel was ignored by someone in an office 100 mile away, who decided to go ahead and attempt repairs with divers. After all, Captain Gaspard was at the slip and could see the debris in and along the slip firsthand. He was in the best position to decide how to safely repair the vessel. No explanation was provided for why his recommendation was ignored.

FACT NO. 5:

> "Bodd and Runnels set up their diving station at the rear of the slip, sixty feet from the stern of the vessel. Debris in the dock area of the Transocean slip made it impossible for them to set up the station at the customary location, the stern of the vessel." (Page 358) "This was a sixty foot walk, during which Bodd's air hose had to be dragged over debris on the bottom of the slip." (Opinion Pages 358-359, reproduced in Appendix, Page A-17,infra.)

This fact was observed by both Cheramie supervisors. The jury certainly could have concluded that the Cheramie supervisors were aware that the forced location of Bodd's dive station created a hazardous situation. The jury could have concluded that the Cheramie supervisors knew that the debris on the bottom of the slip would be hazardous to Bodd in light of the fact that he had to drag his air hose 60 feet behind him to reach the work place. The jury also could have concluded that the forced location of

the dive station seriously lessened the chances of effecting a safe rescue in the event Bodd did get into trouble.

FACTS NO. 6 & 7:

> "Bodd first performed an inspection drive which lasted fifteen or twenty minutes. Bodd inspected both propellors and reported to Gaspard and Gaspard's supervisor, Buddy Curoles, that the starboard wheel was fouled with rope and the port wheel with cable. The Cheramie supervisors did not know the port wheel was also fouled until this time." (Opinion Page 359, reproduced in Appendix, Page A-18, infra.)

> "Gaspard testified without contradiction that he relies on the diver's recommendations in these situations and that *he would have moved the vessel if Bodd had so requested. However, he did not so advise Bodd. Runnels testified that he and Bodd did not request that the boat be moved because both propellors were fouled and they did not know it could be moved.*" (Opinion Page 359, reproduced in Appendix, Page A-18. infra.)

The jury could easily have concluded that Cheramie acted unreasonably in failing to tell Bodd that the vessel was capable of being moved to a slip where Bodd could set up his equipment next to the vessel and not have to drag his air hose over debris. The jury could reasaonably have concluded that only Gaspard knew the vessel was capable of moving to a safer work place after being informed both propellors were fouled. Since the jury may have concluded that only Cheramie had knowledge of the fact that the vessel could be moved to a safer work place and that only Cheramie had authority to move the vessel to a safer place, it violated its duty to Bodd to provide a safe place in which to work by not moving the vessel to a safer slip.

FACT NO. 8:

> "Gaspard and Curoles then contacted the

the charterer, CNG Producing Company. *Curoles recommended dry-docking the boat.* Because the vessel was needed for another job and it was thought dry-docking might take too long, the decision was made to request the diver to proceed with the wheel job in the Transocean slip." (Opinion Page 359, reproduced in Appendix, Page A-18, infra.)

While the exact reason behind Curoles' recommendation to dry-dock the vessel was never identified, the jury could reasonably have concluded that Curoles made this recommendation because of the hazardous conditions he had observed firsthand in the Transocean slip. He was aware of the debris on the bottom of the slip. He was aware that Bodd was forced to drag his air hose 60 feet over debris on the bottom of the slip. He was aware of the fact that Bodd was an inexperienced diver. He was aware that the location of the dive station severely hampered any possibility of a rescue operation in the event the diver did get into trouble. The jury could easily have concluded that Cheramie acted unreasonably in ignoring the second recommendation of an on-site supervisor to dry-dock the vessel for repairs and allowing the decision to proceed with the divers to be made by someone 100 miles away and for economic reasons.

FACTS NO. 9 & 10:

> "Bodd performed three more dives. *On each dive he complained over the radio to his tender about his air hose becoming tangled with the debris on the bottom of the slip.* Gaspard and Curoles observed Bodd's dives. Gaspard heard the radio communications between Bodd and his tender." (Opinion Page 359, reproduced in Appendix, Page A-18, infra.)
>
> "During Bodd's fourth dive, Runnels noticed that the radio was dead and that air bubbles were no longer apparent."(Page 359) "Gaspard and Curoles had great difficulty in pulling up the air hose which seemed to snap several times on

something under the surface." ***"Bodd's body was later found floating under the vessel near its bow." (Opinion Pages 359-360, reproduced in Appendix, Pages A-18—A-19, infra.)

Consider the following inferences which the jury might have drawn and which were not addressed in the Court of Appeals' Opinion:

> (1) that Cheramie had actual knowledge that Bodd was in danger because they observed his air hose become tangled in debris and heard Bodd complain about the problem on his radio;
>
> (2) that Cheramie acted unreasonably in failing to move the vessel to a safer work place or to intervene and stop Bodd;
>
> (3) that Bodd was young and inexperienced and that the Cheramie supervisors knew this;
>
> (4) that the two on-site supervisors allowed Bodd to continue to subject himself to danger because they had already twice recommended that the vessel be dry docked for repairs and these recommendations were ignored;
>
> (5) that Gaspard and Curoles failed to intervene and to stop Bodd because they were under orders to continue repair operations with a diver, when both of them had previously recommended a different and safer method of repair;
>
> (6) that Bodd's air hose became tangled on debris in the slip and, faced with a desperate situation, Bodd released his air hose and swam to what he thought was the rear of the boat.

The list could go on. Suffice it to say, that there were many inferences of Cheramie's negligence unaddressed by the Court of Appeals in its opinion.

Let us now discuss the above facts and reasonable inferences in light of the three duties owed by the owner of a vessel to a ship repairer, set forth in *Scindia Steam*

Navigation Co. v. De Los Santos, 451 U.S. 156 (1981). *The first duty owed by a vessel owner to a ship repairer is to furnish the repairer a safe place to work.* Consider the following inferences the jury may have drawn from the evidence which established that Bodd was not furnished a safe place in which to work:

> 1) Cheramie did not provide Bodd with a work space where he could properly set up his dive station next to the stern of the vessel and where Bodd could perform underwater repairs without encountering debris that would snag his air hose; and
>
> 2) Cheramie did not provide Bodd a safe place to work in failing to move the vessel to a safe slip.

Cheramie controlled the decision as to where the work was to be performed. While Cheramie could not make safe the "underwater conditions" in the Transocean slip, it could have made the underwater conditions safe by moving the vessel to a safe slip.

The second duty owed by a vessel owner to a ship repairer under Scindia is to warn the ship repairer of any hidden dangers which the owner knows or should know about in the ecercise of due care. A logicial extension of this duty would require that the vessel owner warn or inform the ship repairer that it is possible to avoid a danger when only the vessel owner has knowledge that it is possible to avoid a danger. The facts and inferences discussed above certainly support a finding by the jury that Chermie was negligent for failing to warn Bodd that it was possible to avoid the dangers existing in the Transocean slip by moving the vessel to a safer slip. The jury could have concluded also that only Cheramie knew the vessel was capable of being moved to another location and was negligent for failing to inform Bodd when he was under the impression the vessel was incapable of movement. This effectively deprived Bodd of an informed and voluntary choice concerning his decision to work in hazardous conditions existing in the slip.

Under *Scindia, the third duty owed by a vessel owner to a ship repairer is to intervene and stop the ship repairer if the vessel owner acquires knowledge that a condition is presenting a danger to the ship repairer and that the employer of the ship repairer is unreasonably failing to protect the ship repairer from that damage.* Actual knowledge can be inferred from the evidence and can be proven by circumstantial evidence. This was made clear in the case of *Morein v. Reading & Bates Drilling Co.*, et al, Fifth Circuit No. 83-4768 (1984), where the court stated:

> "The jury *could have inferred such actual knowledge* on the basis of evidence from which it could have found that the condition of the seas was obvious to both the N.J. Guilbeau and the M/V State Pride personnel and that it was likewise obvious to the latter that the former were aware of the dangerous conditions of the sea but nevertheless commenced and continued unloading operations. *There is no requirement that actual knowledge be proved by direct testimony,* such a witness testifying he knew something, or testimony that a particular employee was expressly told of a given situation. *Actual knowledge, like any other matter at issue can be proved by circumstantial evidence.*"

The evidence discussed earlier is clearly sufficient to support a finding that Cheramie had actual knowledge of the snagging of Bodd's air hose on debris and that this was a dangerous situation. On two occasions, Cheramie supervisors requested the vessel be moved out to the Transocean slip for repairs, and twice these recommendations were ignored. The debris in and along the slip was obvious to everyone before the diving operation began. The Cheramie supervisors observed that Bodd was forced to set up his dive station 60 feet away from the stern of the vessel and drag his air hose over obvious debris sticking out of the water. The Cheramie supervisors actually observed Bodd encounter problems with his air hose becoming tangled in

the debris and heard him complain about this problem over the radio. Furthermore, the Cheramie employees knew Bodd was inexperienced. They saw Bodd continue to attempt repair work in spite of the fact that his air hose was getting snagged in debris. The Cheramie employees knew that no Martech supervisor was around to protect Bodd from unreasonably exposing himself to these dangers in his eagerness to successfully complete his first job as a diver. Despite this actual knowledge, Cheramie failed to intervene and to stop Bodd.

A fair consideration of all the facts in light of *Scindia*, supra, reveals that there is abundant evidence in the record to support the jury's finding that Cheramie violated *all three* of its duties to Bodd.

III. DID THE COURT OF APPEALS ERR IN FINDING THE EVIDENCE INSUFFICIENT TO SUPPORT THE JURY'S CONCLUSION THAT RESPONDENT, TRANSOCEAN CONTRACTORS, INC. WAS NEGLIGENT?

In one paragraph on Page 369 of its opinion, the Court of Appeals concludes that the evidence was insufficient to support a finding of negligence against the slip owner, Transocean. See Appendix, Page A-32. infra. A fair review of the facts demonstrates that there was a great deal of evidence to support a finding of negligence as to Transocean. Since the Court of Appeals failed to discuss facts which might have supported a finding of negligence against Transocean in its opinion, an examination of these facts is in order. Once again, to simplify matters, only facts that appear in the Court of Appeals' Opinion will be set forth After each fact is set forth below, a discussion of the reasonable inferences which the jury may have drawn from these facts follows.

FACT NO. 1:

"While backing into the Transocean slip, the

> right propellor of the Bo-Truc became fouled and the starboard engine shut down." (Opinion Page 358, reproduced in Appendix, Page A-17, infra.)

The jury could very well have concluded from the above fact: that the Transocean slip was not properly maintained by Transocean; that Transocean was not keeping its slip free of debris, since a vessel entering the slip was unable to do so without getting debris entangled in its propellors; that a reasonable slip owner will anticipate that vesels will enter its slip and that it has the duty to keep the slip free of debris and obstructions. The fact that Bo-Truc could not even enter the Transocean slip without getting its propellors fouled, certainly supports the conslusion that Transocean was violating its duty to keep the slip free of obstructions. The jury could also have reasonably concluded that it was the violation of this duty that started the chain of events that led to Bodd's death. If Transocean had keep its slip clean, the Bo-Truc could have entered the slip without difficulty and it would never have been necessary to request divers to perform repair work.

FACT NO. 2:

> "The slip contained a great deal of junk and debris." (Page 358) "Visible debris floated at the edge of the slip." (Opinion Page 358, reproduced in Appendix, Page A-17, infra.)

The jury could have very well concluded from these facts: that Transocean was unreasonably failing to maintain its slip and that this unreasonable conduct had been occurring for some time; that the Transocean employees had knowledge that the bottom of the slip was covered with debris; that Transocean either knew or should have known that the debris in the slip would create problems for vessels entering the slip and dangers to divers attempting to work in the slip; that Transocean acted unreasonably in failing to keep its slip free of debris and this unreasonable conduct contributed to Bodd's death; that, if the slip was properly maintained, then the propellors of the vessel would not

have become fouled and the air hose would not have become tangled.

FACT NO. 3:

> "Bodd and Runnels set up their diving station at the rear of the slip, sixty feet from the stern of the vessel. Debris in the dock area of the Transocean slip made it impossible for them to set up the station at the customary location, the stern of the vessel." (Opinion Page 358, reproduced in Appendix, Page A-17, infra.)

From the above facts, the jury could reasonably have concluded: that Transocean's failure to maintain the dock area of the slip forced Bodd to set up his diving station 60 feet from the vessel; that this unreasonable failure to maintain the dock area played a casual relationship in bringing about Bodd's death. If Bodd had not been prevented from setting up his dive station next to the vessel because of junk lying along the side of the slip, he would not have been forced to drag his air hose 60 feet over the debris in the slip itself. Furthermore, if Bodd could have set up his dive station next to the vessel, it would have greatly increased the potential to rescue Bodd. The jury could have concluded that Transocean acted unreasonably in allowing debris to accumulate along the side of the slip, when it either knew or should have known this accumulation of debris would hamper the activities of people working in the slip.

FACT NO. 4:

> "Bodd performed three more dives. On each dive he complained over the radio to his tender about his air hose becoming tangled with the debris on the bottom of the slip." (Page 359) "*Transocean employees were also present during these diving operations.*" (Opinion Page 359, reproduced in Appendix, Page A-18, infra.)

From knowledge of the fact that Transocean employees were present during the dives, the jury could have concluded many things. It could have concluded: that

Transocean had knowledge that Bodd was forced to set up his diving station 60 feet from the stern of the vessel and forced to drag his air hose over obvious debris in the slip; that since Transocean employees were present during the dives and that Bodd experienced difficulty with his air hose becoming tangled in debris each dive, that Transocean had knowledge of the problems which Bodd was experiencing. Perhaps the jury concluded that Transocean should not have allowed Bodd to attempt the repairs even if it did not have actual knowledge of the problems experienced by Bodd. Under the general maritime law, it is not necessary to prove "actual knowledge" to prove negligence. Perhaps the jury felt Transocean "should have known" it was hazardous to allow Bodd to attempt the repairs.

Now that the facts and inferences upon which the jury may have relied in finding Transocean negligent have been identified, it now becomes possible to evaluate whether the evidence is sufficient to sustain the verdict. While contradictory and sometimes confusing, the facts and inferences discussed above are clearly sufficient to support the jury's conclusion that Transocean was negligent. Before addressing the findings of negligence, a few words are in order concerning the standard which should be used in evaluating Transocean's conduct.

In the only paragraph of the opinion directed to the sufficiency of the evidence against Transocean, the Court of Appeal discussed only one possible duty which Transocean may have violated. See Opinion Page 369, reproduced in Appendix, Page A-32, infra. Curiously, the duty discussed is the duty of Transocean "to warn Bodd only of dangers that were reasonably forseeable." The reason this is curious is that petitioners never argued to the jury that Transocean violated any duty it may or may not have had to warn Bodd of dangers. If it was never urged that Transocean was negligent for failing to warn Bodd of dangers, then it is clear that the Court of Appeals did not properly

evaluate the evidence that the Court of Appeals cites the decision of *Daigle v. Point Landing, Inc.*, 616 F.2d 825 (1980), in support of the conclusion that: "Transocean had a duty to warn Bodd only of dangers that were reasonably forseeable." See Opinion Page 369, reproduced in Appendix, Page A-32, infra. Petitioners do not quarrel with this statement, but submit that focus of the Court on the "duty to warn" and the *Daigle* decision, shows that the Court never evaluated the sufficiency of the evidence under the theories of negligence advanced by petitioners at trial. The *Daigle* decision is a case where the only theory of negligence advanced by the plaintiff was that the owner of a vessel failed to warn him before applying power to the engine. In the immediate case, it was urged that Transocean was negligent for several reasons, but failure to warn was not one of them. For this reason alone, this petition for certiorari should be granted and the sufficiency to the evidence against Transocean evaluated under the theories of negligence argued to the jury.

The *Daigle* case is one arising under the general maritime law and does discuss the proper standard by which the conduct of a defendant should be evaluated. In addressing that standard of care, the Court states:

> "In analyzing a maritime tort case we rely on general principles of negligence law. S.C. Loveland, Inc. v. East West Towing, Inc. 608 F.2d 160, 165 (5th Cir, 1979). *The plaintiff is owed a duty of ordinary care.*" 616 F.2d at 827 (emphasis added)

Thus, in a maritime tort case, the standard of care owed by a defendant is one of reasonableness or ordinary care. With this understanding of the standard of care required of a defendant in a maritime tort case, it now becomes possible to evaluate whether the facts and inferences discussed above are sufficient to support a conclusion that Transocean failed to exercise "ordinary care."

From the facts and inferences above, the jury could have concluded that it was unreasonable for Transocean not to maintain the bottom or side of its slip and that these inactions contributed to Bodd's death. It has been held that a dock owner has a duty to exercise reasonable diligence in ascertaining the condition of its slip and to remove any dangerous obstructions. This duty was addressed in *U. S. v. Mowbray's Floating Equip.*, 601 F.2d 645 (1979), where the court stated:

> "A wharfinger's obligation is not to 'guarantee the safety of his vessels coming to his wharves' but to '*exercise reasonable diligence in ascertaining the condition of the berths thereat, and if there is any dangerous obstruction, to remove it,* or to give due notice of its existence to vessels about to use the berths." 601 F.2d 646 (emphasis added)

It was also urged that Transocean was negligent in allowing diving operations in the slip and the evidence clearly supports such a finding. Perhaps the jury felt that if Transocean did not have the good sense to maintain its slip, then it was unreasonable for it to allow underwater repairs to be attempted. Perhaps the jury felt it was negligent for Transocean not to have ordered the diver out of its slip or to have ordered the captain to move the vessel to a safer slip. It was also urged that if Transocean did not know underwater repairs were taking place in its slip, then it was negligent for failing to properly supervise its slip. Such a finding would be supported by the evidence. The jury may also have concluded that Transocean employees were aware of the problems Bodd was experiencing and acted unreasonably in allowing him to continue. All of the actions and omissions are sufficient to support a finding that Transocean was negligent.

It is submitted that if this Court evaluates the facts and inferences in the record upon which the jury might have relied in finding Transocean negligent, it will conclude that this result is supported by the record. For this reason, petitioners pray that this petition for certiorari be granted and judgment against Transocean be reinstated.

CONCLUSION

For the reasons stated above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Petition for Certiorari has this day been forwarded to the following counsel of record, by depositing same in the United States Mail, postage prepaid and properly addressed, to-wit:

RANDALL K. THEUNISSEN, Attorney for Transocean
Contractors, Inc., P. O. Drawer 3768,
Lafayette,
Louisiana 70502

JAMES R. CARTER and GLENN B. ADAMS, Attorneys
for Cheramie Bo Truc #11, Inc., 704
Carondelet St.,
New Orleans, Louisiana 70130

This 10th day of February, 1986.

JAMES P. RYAN

APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

DOLORES BODD CASACELI, ET AL

CIVIL ACTION NO.

VS. 800097 SECTION O

MARTECH INTERNATIONAL, INC.

CONSOLIDATED WITH

DOLORES BODD CASACELI, ET AL

CIVIL ACTION NO.

VS. 800098 SECTION O

CHERAMIE BO TRUC #11, INC.

FILED APRIL 12, 1984

JUDGMENT

These actions came on for trial before the Court and a jury, Honorable John M. Shaw, District Judge, presiding, and the issues having been duly tried, and the Court having instructed the jury to make answer to certain special interrogatories, and the jury having duly rendered a verdict and having made answer to said special interrogatories as follows:

SPECIAL INTERROGATORY TO THE JURY: SEAMAN STATUS

Do you find that at the time of death Joseph Stanley Bodd was a seaman and member of the crew of a vessel, or a fleet of vessels?

Answer Yes or No (NO)

SPECIAL INTERROGATORIES

1) Do you find from a preponderance of the evidence that Cheramie Bo Truc #11, Inc. was negligent in the manner claimed by the plaintiffs and that such negligence was a legal cause of Joseph Bodd's death?

Answer Yes or No **(YES)**

2) Do you find from a preponderance of the evidence that Transocean Contractors, Inc. was negligent in the manner claimed by the plaintiffs and that such negligence was a legal cause of Joseph Bodd's death?

Answer Yes or No **(YES)**

3) If you answered "Yes" to any of the questions above, do you find from a preponderance of the evidence that the decedent himself was negligent in the manner claimed by the defendants and that such negligence was a legal cause of decedent's own death?

Answer Yes or No **(YES)**

4) If you answered "Yes" to Question One, what proportion or percentage of Josephs Bodd's death do you find from a preponderance of the evidence to have been legally caused by Cheramie Bo Truc #11, Inc.?

Answer in Terms of Percentage: **(45%)**

5) If you answered "Yes" to Question Two, what proportion or percentage of Joseph Bodd's death do you find from a preponderance of the evidence to have been legally caused by Transocean Contractors, Inc.?

Answer in Terms of Percentage: (45%)

6)If you answered "Yes" to Question Three, what proportion or percentage of plaintiffs' damages do you find from a preponderance of the evidence to have been legally caused by the negligence of Joseph Bodd?

Answer in Terms of Percentage: (10%)

7) If you answered "Yes" to Question One or Two, what sum of money do you find from a preponderance of the evidence to be the total amount of damages, if any, resulting from Joseph Bodd's conscious pain and suffering prior to his death?

Answer in Dollars: ($75,000)

8) If you answered "Yes" to Question One or Two, what sum of money do you find from a preponderance of the evidence to be the total amount of damages, if any, resulting from the loss of society suffered by Evelyn Bodd as a result of her son's death?

Answer in Dollars: ($150,000)

9) If you ansewered "Yes" to Question One, should punitive damages be assessed against Cheramie Bo Truc #11, Inc.?

Answer Yes or No **(YES)**

10) If you answered "Yes" to Question Nine, what amount of punitive damages should be asessed against Cheramie Bo Truc #11, Inc.?

Answer in Dollars: **($250,000)**

11) If you answered "Yes" to Question Two, should punitive damages be assessed against Transocean Contractors, Inc.?

Answer Yes or No **(YES)**

12) If you answered "Yes" to Question Eleven, what amount of punitive damages should be assessed against Transocean Contractors, Inc.?

Answer in Dollars: **($250,000)**

13) If you answered "Yes" to Question One or Two, do you find froma preponderance of the evidence that plaintiffs are entitled to an award of prejudgment interest?

Answer Yes or No **(YES)**

14) If you answered "Yes" to Question Thirteen, what rate of prejudgment interest do you find from a preponderance of the evidence to be due plaintiffs?

Answer: **(10%)**

15) If you answered "yes" to Question Thirteen, from what date does prejudgment interest begin to run?

Answer: **(First trial date set in this case)**

IT IS ORDERED AND ADJUDGED that there be judgment herein in favor of plaintiff, DOLORES BODD CASACELI, individually and as duly authorized representative of the Estate of Joseph Stanley Bodd, and against defendants, CHERAMIE BO TRUC #11, INC. and TRANSOCEAN CONTRACTORS, INC., jointly, severally, and in solido, in the full sum and amount of SIXTY-SEVEN THOUSAND FIVE HUNDRED AND NO/100 ($67,500.00) DOLLARS, together with interest at the rate of 10% from October 13, 1981, the first trial date set in this case, to date of judgment and interest at the rate of 10.60% from date of judgment, until paid.

IT IS FURTHER ORDERED AND ADJUDGED that there be judgment herein in favor of plaintiff, EVELYN BODD, and against defendants, CHERAMIE BO TRUC #11, INC. and TRANSOCEAN CONTRACTORS, INC., jointly, severally, and in solido, in the full sum and amount of ONE HUNDRED THIRTY-FIVE THOUSAND AND NO/100 ($135,000.00) DOLLARS, together with interest at the rate of 10% from October 13, 1981, the first trial date set in this case, to date of judgment and interest at the rate of 10.60% from date of judgment, until paid.

IT IS FURTHER ORDERED AND ADJUDGED that there be judgment herein in favor of plaintiffs, DOLORES BODD CASACELI, Individually and as duly authorized representative of the Estate of Joseph Stanley Bodd, and EVELYN BODD, and against defendant,

CHERAMIE BO TRUC #11, INC. in the full sum and amount of TWO HUNDRED FIFTY THOUSAND AND NO/100 ($250,000.00) DOLLARS, together with interest at the rate of 10.% from October 13, 1981, the first trial date set in this case, to date of judgment and interest at the rate of 10.60% from date of judgment, until paid.

IT IS FURTHER ORDERED AND ADJUDGED that there be judgment herein in favor of plaintiffs, DOLORES BODD CASACELI, Individually and as duly authorized representative of the Estate of Joseph Stanley Bodd, and EVELYN BODD, and against defendant, TRANSOCEAN CONTRACTORS, INC., in the full amount of TWO HUNDRED FIFTY THOUSAND AND NO/100 ($250,000.00) DOLLARS, together with interest at the rate of 10% from October 13, 1981, the first trial date set in this case, to date of judgment and interest at the rate of 10.60% from date of judgment, until paid.

IT IS FURTHER ORDERED AND ADJUDGED that the defendants, CHERAMIE BO TRUC #11, INC. and TRANSOCEAN CONTRACTORS, INC., pay all costs of this action.

OPELOUSAS, LOUISIANA, this 12th day of April, 1984.

ROBERT H. SHEMWELL, CLERK

BY: /s/ Mildred Baker
MILDRED BAKER, DEPUTY CLERK

APPROVED AS TO FORM:

/s/ John M. Shaw
JOHN M. SHAW, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

DOLORES BODD CASACELI, ET AL
CIVIL ACTION NUMBER
VS. 800097
MARTECH INTERNATIONAL, INC.
SECTION O

CONSOLIDATED WITH

DOLORES BODD CASACELI, ET AL
CIVIL ACTION NUMBER
VS. 800098
CHERAMIE, BO TRUC #11, INC.
SECTION O

RULING

The defendants, Cheramie Bo Truc No. 11, Inc. (hereafter Cheramie) and Transocean Contractors, Inc. (hereafter Transocean) have both moved for judgments notwithstanding the verdict, in the alternative, a new trial, and in the further alternative, remittiur.

I. *JNOV - NEGLIGENCE*

Cheramie argues that in light of recent jurisprudence, specifically *Hill v. Texaco, Inc.* 674 F.2d 447 (5th Cir. 1982) and *Stass v. American Commercial Lines, Inc.*, 720 F.2d 879 (5th Cir. 1983), Cheramie cannot

be found liable as a matter of law under 33 U.S.C. § 905(b). We disagree.

We preface our discussion with a statement of the test for determining whether to grant a motion for judgment notwithstanding the verdict. The standard is the same as that applied to a motion for directed verdict. This Court must examine the evidence in the light and with all reasonable inferences most favorable to the party opposing the motion. "[I]f there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied,..." *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969)(en banc).

In the trial court's recollection the evidence presented to the jury inferred two possible theories of Cheramie negligence: (1) that Cheramie was negligent in requesting that the wheel job be performed in the Transocean slip rather than in dry dock or, at least, in another slip not so filled with debris; (2) that Cheramie failed to moor the vessel in a secure manner so as to avoid a substantial back and forth movement of the vessel with each fluctuation of the water level in the slip.

Cheramie relies upon a principle of law recognized in *West v. United States*, 361 U.S. 118 (1959), and reasserted in *Hill* and *Stass, supra*, that the shipowner who has hired an independent contractor to perform repairs to the vessel is under no duty to protect the longshoreman performing the repairs from risks that are inherent in carrying out the contract. Cheramie argues that this principle precludes imposition of liability in this case. However, we do not believe that the facts of this case invoke application of the preclusive *West* principle. In *West*, the court denying relief stated:

> "It appears manifestly unfair to apply the requirements of a safe place to work to the shipowner when he has no control over the ship or the repairs, and the work of repair in effect creates the danger which makes the place unsafe." *Id.* at 123.

In the instant case we note that the owner and/or master of the vessel had control over the decision regarding where repairs should be conducted and also over the proper mooring of the vessel. Although the dangerous condition of the Transocean slip and the back and forth movement of the vessel were dangers that the decedent was forced to face as a result of the work of repair which he had undertaken, they were not dangers created by the repair work itself. The cluttered condition of the Transocean slip and the improperly moored vessel were dangerous conditions independent of the work of repair. Thus, the *West* principle does not dictate that Cheramie must be absolved of liability as a matter of law in this case.

Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156 (1981), established the requirement that the shipowner has a responsibility to eliminate dangerous conditions which exist at the outset of repair operations, that is, to turn over to the longshoreman a reasonably safe place to work. The jury may reasonably have concluded that Cheramie breached this obligation. We would also note that the fact that a dangerous condition may have been open and obvious to the longshoreman does not negate the duty of care otherwise owed by the shipowner. *Stass,* 720 F.2d 879, at 882.

Considering the evidence in a light most favorable to the plaintiff, we must deny Cheramie's motion for a

judgment notwithstanding the verdict. The Transocean motion for a judgment notwithstanding the verdict is also denied because there was sufficient evidence to withstand a directed verdict on the causation issue raised by Transocean.

II. *JNOV - Conscious Pain and Suffering, or Alternatively a Remittitur*

Both defendants also moved for a judgment notwithstanding the verdict on the award for conscious pain and suffering on the basis that there was no evidence to support such an award, Pertinent evidence adduced on this issue included: (1) a photograph of a cut on the decedent's face; (2) the fact that the decedent's right arm was frozen into an uplifted position and his fist was tightly clinched when his body was recovered, and (3) that certain pieces of his diving head gear which should never be removed underwater had been so removed. Although there was no eyewitness, the evidence presented was sufficient for the jury to infer that the decedent was conscious for some time period before death, and that he must have suffered severe conscious mental and physical pain and fright of his impending death, *See, Consolidated Machines, Inc. v. Protein Product Corporation,* 428 F. Supp. 209, 229 (M.D. Fla. 1976); *Complaint of Metcalf,* 530 F. Supp. 446, 459 (S.D.Tx. 1981). Thus, the motions for judgment notwithstanding the verdict on this issue are denied.

In the alternative, the defendants have requested a remittitur because the $75,000 award for conscious pain and suffering is excessive and against the weight of the evidence. The test for deciding when a remittitur is appropriate has been set forth as follows:

The Court is not free to set aside the verdict merely because the judge might have awarded a different amount of damages, but it may do so if the proceedings have been tainted by appeals to prejudice or if the verdict, in the light of the evidence, is so unreasonable that it would be unconscionable to permit to stand. Wright & Miller, *Federal Practice and Procedure:* Civil § 2807.

Several federal cases very much in point were cited, but we do not find that they mandate remittitur. In the cases cited involving deaths by drowning there was either direct evidence or inference that the decedent had suffered more than a few minutes. *See Cook v. Ross Island Sand and Gravel,* 621 F.2d 746 (9th Cir. 1980); *Hlodan v. Ohio Barge Line, Inc.,* 611 F.2d 71 (5th Cir. 1980). A lack of evidence in this case made it impossible to determine exactly how long Joseph Bodd suffered prior to his death. However, it was inferred and the jury may have reasonably concluded that Mr. Bodd somehow became entangled or trapped below the surface of water and that he struggled to free himself for an extended period of time knowing as he struggled that death was imminent when his oxygen was exhausted. Thus, we must defer to the jury's award because we do not find the award shocking to the conscience in light of the evidence. The motion for remittitur of the award for conscious pain and suffering is denied.

III. *Loss of Society - Remittitur*

The jury awarded Evelyn Bodd, the decedent's mother, $150,000 for loss of society. Loss of society is, indeed, a compensable element of damages in this case. It is defined as the loss of positive benefits, i.e., "the broad range of mutual benefits each family member receives from another's continued existence, including love, affection,

care, attention, companionship, comfort and protection." It does not include the mental anguish or grief suffered as an emotional response to the death. *Cruz v. Hendy Intern, Co.*, 638 F.2d 719, 726 (5th Cir. 1981) citing *Sea Land Services v. Gaudet*, 414 U.S. 573, 585 (1974).

The evidence adduced regarding Mrs. Bodd's relationship with her son during the years from 1975 up until the time of his death in 1981 indicated that they did not maintain a close relationship. He left home in New York in 1975 and went home only infrequently for Christmas visits. In light of the evidence and the awards given in similar cases, we believe that the award for loss of society was unreasonably high. *See LaBoeff v. Goodyear Tire and Rubber Co.*, 451 F. Supp. 253 (W.D.La. 1978); *Crabtree v. Martin Exploration Co.*, 467 F. Supp. 1269 (E.D.La. 1979). Accordingly, the Court orders a remittitur of the award from $150,000 to SEVENTY-FIVE THOUSAND AND NO/100 ($75,000.00) DOLLARS. Alternatively, the Court will grant a new trial on the loss of society element of damages in the event that plaintiff does not consent to the remittitur.

IV. *JNOV - Punitive Damages, or Alternatively, Remittitur*

Defendants argue that punitive damages may not be awarded as a matter of law in a case under 905(b). Counsel specifically argue that the statement in Complaint of Merry Shipping, 650 F.2d 622 (5th Cir. 1981) that punitive damages may be recovered under general maritime law is inapplicable to a 905(b) action. We disagree. Statements by the Supreme Court in *Edmonds v. Compagnie Generale Transatl.*, 443 U.S. 256, 259 (1979) and by the Fifth Circuit

in *Russell v. Atlantic & Gulf Stevedores,* 625 F.2d 71, 72 (5th Cir. 1980) make it clear that section 905(b) did not create a new cause of action but merely recognized an existing general maritime law claim. Thus, 905(b) is a general maritime cause of action and punitive damages may, accordingly, be awarded in a 905(b) case. The motion to remit the punitive damages award is also denied.

V. *Motions for New Trial*

The motions for a new trial filed by Cheramie and Transocean are denied, except in the event that the plaintiff refuses to accept a remittitur of the award for loss of society damages as discussed, *supra.*

In summary, the motion for remittitur of the award of damages for los of society is GRANTED with the condition that if plaintiff refused to accept a remittitur, a new trial solely on that issue of damages will be granted. All other post-trial motions are DENIED.

Opelousas, Louisiana, June 22, 1984.

/s/ John M. Shaw

JOHN M. SHAW
UNITED STATES DISTRICT
JUDGE

Judgment Entered 6-28-84

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DOLORES BODD CASACELI, Idividually
& as representative of succession of
Joseph Stanley Bodd, etc.,
Plaintiffs-Appellees,

No. 84-4452

v.

OPINION

MARTECH INTERNATIONAL, INC., ET AL.,
Defendants,
TRANS OCEAN CONTRACTORS, INC. and
CHERAMIE BO-TRUC #11, INC.,
Defendants-Appellants.

Filed October 29, 1985
Before: Clark, Chief Judge, Randall and Jolly, Circuit Judges.
Opinion by Judge Clark

Appeal from the United States District Court
for the Western District of Louisiana
John M. Shaw, District Judge, Presiding

SUMMARY

Admiralty/Torts

Appeal from judgment for plaintiff in an action for damages arising from the death of a diver. Reversed and remanded with directions.

Bodd drowned while atempting to repair the CHERAMIE

BO-TRUC while it was docked in a slip owned by Transocean. The water in the slip was muddy and contained visible debris. Bodd made four dives attempting to repair the ship, Bodd did not complain about the diving conditions to anyone other than his tender telling him that the air hose was becoming tangled in debris. During Bodd's fourth dive, he drowned.

[1] Under *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981) which defines a vessel's duty to longshoremen under the Longshoremen's and Harbor Worker's Compensation Act (LHWCA), the shipowner may generally rely on the stevedore's exercise of reasonable care and need only intervene if the shipowner becomes aware of a dangerous condition in the ship's gear during the stevedoring operation and is also aware that the stevedore is unreasonably failing to protect a longshoreman against the danger. [2] *Hill v. Texaco, Inc.*, 674 F.2d 447 (5th Cir. 1982) expanded *Scindia* to apply to any independent contractor and its employees covered by the LHWCA. [3] *Futo v. Lykes Bros. S.S. Co.*, 742 F.2d 209 (5th Cir. 1984) held that a shipowner has no duty to intervene for dangerous conditions created by the stevedore even when the owner had actual knowledge of the unsafe condition. [4] General maritime law allows survivors of a decedent to recover damages the decedent could have recovered but for his death. [5] In a maritime tort case, the defendant owes the plaintiff a duty of ordinary care, which includes a duty to warn only of harm that is reasonably forseeable. [6] Under *Scindia* the shipowners did not breach any duty owed to Bodd under the LHWCA. [7] They provided Bodd with a reasonably safe work place and told him as much as they knew about the propeller. Only an expert *diver* like Bodd, could determine the risks an underwater repair at the slip would entail. [8] The shipowners need not

have protected Bodd from risks that were inherent in the carrying out of the contract. [9] The shipowners had a duty to intervene and stop Bodd from attempting the repair only if they knew underwater conditions presented a danger and that Bodd was acting unreasonably in attempting to complete the repair, information they did not possess. [10] The defect which caused Bodd's death was the underwater situation in which he worked, a defect that was not a part of the ship's normal gear which the owner created or controlled. Therefore, the owner breached no duty to Bodd under the LHWCA. [11] Likewise, the owner's general duty to warn did not extend to this danger which was not reasonably foreseeable.

OPINION

CLARK, Chief Judge:

Transocean Contractors, Inc., and the CHERAMIE BO-TRUC #11, appeal the judgments against them in an action for damages resulting from the death of a diver, Joseph Bodd. Bodd drowned during an attempt to repair the CHERAMIE BO-TRUC while it was docked in a slip owned by Transocean. Because the evidence is not sufficient to support the verdicts against the appellants, we reverse.

I

Joseph Bodd, an employee of Martech International, Inc. (Martech), worked as a diver's tender on board the CHERAMIE BO-TRUC #11 for the two weeks prior to August 12, 1978. The vessel was conducting a salvage operation for CNG Producing Company in the Gulf of Mexico. Although Bodd had attended diving school for six

months in 1975 and was a certified professional diver, he had never performed a professional dive. He did perform one unpaid 120 foot dive during this salvage operation.

The CHERAMIE BO-TRUC #11 returned to the intercoastal waterway on August 12, 1978, and unloaded Martech personal and equipment at a slip owned by Martech. It then docked at the adjacient slip owned by Transocean Contractors, Inc. (Transocean), approximately 100 feet away. While backing into the Transocean slip, the right propeller of the BO-TRUC became fouled and the starboard engine shut down, The captain docked the vesel by using the port engine. The BO-TRUC had docked at this slip four or five other times without encountering any problems. The slip contained a great deal of junk and debris.

Martech is a professional diving company. Although Captain Gaspard recommended dry-docking the BO-TRUC for repairs, supervisors decided to contract with Martech for a diver to free the propeller. Martech sent Joseph Bodd and a diver's tender, Tom Runnels, to perform the contract.

Bodd and Runnels set up their diving station at the rear of the slip, sixty feet from the stern of the vessel. Debris in the dock area of the Transocean slip made it impossible for them to set up the station at the customary location, the stern of the vessel. The water in the slip was muddy and permitted only limited visibility. Visible debris floated at the edge of the slip.

Bodd made a total of four dives, all of which involved Bodd's walking from the shallow water at the shore out to the stern of the vessel, where the water was eight to ten feet deep. This was a sixty foot walk, during which Bodd's air hose had to be dragged over debris on the bottom of the slip.

Bodd first performed an inspection dive which lasted fifteen or twenty minutes. Bodd inspected both propellers and reported to Gaspard and Gaspard's supervisor, Buddy

Curoles, that the starboard wheel was fouled with rope and the port wheel with cable. The CHERAMIE supervisors did not know the port wheel was also fouled until this time. Bodd also told the captain that the water depth at the stern of the vessel was good because he could stand on the bottom and reach the propellers. Bodd did not complain about the location of the vessel nor did he ask the captain to move it out of the TRansocean slip. Gaspard testified without contradiction that he relies on the diver's recommendations in these situations and that he would have moved the vessel if Bodd had so requested. However, he did not so advise Bodd. Runnels testified that he and Bodd did not request that the boat be moved because both propellers were fouled and they did not know it could be moved.

Gaspard and Curoles then contacted the charter, CNG Producing Company. Curoles recommended dry-docking the boat. Because the vessel was needed for another job and it was thought dry-docking might take too long, the decision was made to request the diver to proceed with the wheel job in the Transocean slip.

Bodd performed three more dives. On each dive he complained over the radio to his tender about his air hose becoming tangles with the debris on the bottom of the slip. Gaspard and Curoles observed Bodd's dives. Gaspard heard the radio communications between Bodd and his tender. Transocean employees were also present during these diving operations.

On his second dive, which lasted approximately twenty minutes, Bodd unsuccessfully attempted to unravel the cable from the port wheel with a crowbar. Bodd terminated his third dive after thirty minutes because his cutting torch was not operating properly. During Bodd's fourth dive, Runnels noticed that the radio was dead and that air bubbles were no longer apparent. Runnels asked Gaspard and Curoles to pull on the air hose, and dived into the water to rescue Bodd. He was not successful. Gaspard

and Curoles had great difficulty in pulling up the air hose which seemed to snag several times on something under the surface. When the air hose emerged, only the face gear was attached and the regulator was missing. Runnels testified that a missing regulator would allow water to enter the diver's mask and cut off his oxygen. Runnels also testified that the diver would have to intentionally release the life line. He indicated that a diver should not release this line since it allows him to find his way back to the surface. Bodd's body was later found floating under the vessel near its bow.

A diver from another company, after performing an inspection dive the next day, told Gaspard that the job should be done in a dry dock. The vessel was then dry docked for the repairs.

II

Dolores Bodd Casaceli, the representative of Bodd's estate, and Evelyn Bodd, his mother, sued Martech, Transocean and the CHERAMIE BO-TRUC #11 for damages resulting from the death of Joseph Bodd. The plaintiffs settled with Martech. A jury found that Bodd was a longshoreman and not a seaman. The jury also found that Bodd was ten percent negligent and that Transocean and CHERAMIE were each forty-five percent at fault. The jury awarded the plaintiffs $75,000 for Bodd's conscious pain and suffering, and $150,000 for loss of love and affection to Evelyn Bodd. The plaintiffs also received an award of punitive damages in the amount of $250,000 from each defendant. The district court denied the motions of both defendants for judgment notwithstanding the verdict and a new trial. The court did remit the award for loss of love and affection from $150,000 to $75,000. CHERAMIE and Transocean appeal these judgments.

III

We consider first the legal principles applicable to

the vessel's appeal. The 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) provided persons covered by the Act with an action against a vessel for injuries caused by the negligence of the vessel:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

33 U.S.C. § 905(b).[1] Longshoremen and harbor workers covered by the Act include persons engaged in ship repair. 33 U.S.C. §§ 902(3), 903(a). The Act defines "vessel" as "any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner ...." 33 U.S.C. § 902(21). Recovery for disability or death is contingent on the occurrence of the injury while the vessel is "upon the navigable waters of the United States." 33 U.S.C. § 903(a).[2]

[1] The United States Supreme Court defined the vessel's duty to longshoremen under these amendments in *Scindia Steam Navigation Co. v. De Los Santos,* 451 U.S. 156 (1981) (longshoreman injured because of defective winch that stevedore used even though winch had been malfunctioning for two days). The vessel owner must provide work space, ship's gear, equipment, and tools in a condition that allows a stevedore, acting with reasonable care, to carry on his operations with reasonable safety. The owner must warn the stevedore of any hidden dangers which the owner knows or should know about in the exercise of reasonable care. 451 U.S. at 166-67. The owner need not supervise, inspect, or monitor the stevedoring operations for dangerous conditions that develop during that process unless required to do so by contract, positive law, or custom. *Id.* at 167-72. He may generally rely on the

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[1] The amendments also "abolish the longshoreman's right to recover for unseaworthiness and the stevedore's obligation to indemnify the shipowner." *Futo v. Lykes Bros. S.S. Co.,* 742 F.2d 209 (5th Cir. 1984) (opinion on rehearing) (footnote and citation omitted).

[2] "Navigable waters" includes "any adjoining pier wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." 33 U.S.C. § 903(a).

stevedore's exercise of reasonable care. *Id.* at 169-72. An exception to this lack of supervisory duty exists if the shipowner becomes aware of a dangerous condition in the ship's gear during the stevedoring operation, and is also aware that the stevedore is unreasonably failing to protect a longshoreman against this danger. The shipowner then has a duty to intervene and repair the gear constituting the danger. *Id.* at 172-76; *see also Hill v. Texaco, Inc.* 674 F.2d 447, 450-51 (5th Cir. 1982)(articulating the *Scindia* principles).

[2] The Fifth Circuit has extended both the situations to which *Scindia* applies and *Scindia's* analysis of the vessel owner's duty to intervene. *Hill v. Texaco, Inc.* held that "[t]he rationale of *Scindia* is not limited to stevedoring operations. It clearly applies to any independant contractor and its harborworker employees covered by the LHWCA and working aboard ship." 674 F.2d at 451. The *Hill* court, however, found no basis for the imposition of liability on a shipowner who hired an independent contractor to determine the effect of rust on the thickness of tank walls. A contractor's employee who was not wearing a safety line was injured when he lost his footing because of loose rust and fell thirty feet. *Id.* at 448-53.

Futo v. Lykes Bros. S.S. Co. articulated an analysis of the shipowner's duty to intervene and the considerations that are pertinent to an imposition of this duty. 742 F.2d 209 (5th Cir. 1984). *Futo* also involved the application of the *Scindia* principles in a context other than that of stevedoring. The employer in *Futo* was an independant contractor hired by a shipowner to perform repairs necessitated by Coast Guard regulations. 742 F.2d at 210. The longshoreman suffered a fatal injury when he fell to the deck of the ship from a scaffolding erected by his

employer pursuant to its contract with the shipowner. *Id.* at 211. His widow sued the owner under § 905(b), claiming the owner negligently failed to warn the longshoreman of a hazardous condition—the scaffolding had no guardrail. *Id.* The Fifth Circuit held that the vessel owner had no duty to intervene, even if he had full actual knowledge of the danger, *Id.* at 221.

[3] The *Futo court noted that pre-Scindia* cases in the Fifth Circuit concerning a vessel owner's duty to intervene held that "a shipowner would not be held liable under section 905(b) for dangerous conditions created by the stevedore and causing injury to its employees ... even where the owner had actual knowledge of the unsafe condition." *Id.* at 213 (citing *Brown v. Mitsubishi Shintaku Ginko,* 550 F.2d 331 (5th Cir. 1977); *Gay v. Ocean Transport & Trading, Ltd.,* 546 F.2d 1233 (5th Cir. 1977)). The basis for these holdings was an analogy to the duties and exceptions to those duties of landowners toward employees of independant contractors under the Restatement (Second) of Torts, §§ 343, 343A. *Id.* at 212-13. The court found that *Scindia* reduced the scope of liability that those cases allowed, but did not negate the basic rationale underlying those decisions. *Id.* at 216. The *Futo* court found that the *Scindia* exception "does not . . . extend to an open obvious transitory condition" created and controlled by the independent contractor, and wholly related to the contractor's gear and operations. The missing guardrail was such a condition. *Id.*

Two post-*Scindia* cases supported this conslusion. The employee of an independant contractor sued a vessel owner for injuries resulting from the use of defective tongs in *Lewis v. Timco, Inc.,* 697 F.2d 1252 (5th Cir.), *modified in other respects,* 716 F.2d 1425 (1983). Although the

plaintiff argued that the vessel's employees knew he had difficulty in using the tongs, the *Lewis* court held that the tongs were not part of the vessel's normal gear and that the vessel owner did not control or create the circumstances that caused his injury. *Id.* at 1256. The plaintiff in *Helaire v. Mobile Oil Co.* was employed by an independant contractor as a roustabout on a fixed platform in the Gulf of Mexico, 709. F.2d 1031, 1033 (5th Cir. 1983). The contractor arranged for the transportation of materials to the platform with a vessel owner. *Id.* The plaintiff claimed his injuries were due to his fall on deck when he was required to unload the vessel in rough weather. *Id.* at 1037. The court held that *Scindia* imposed liability on the vessel owner for an employee's injuries occurring after unloading operations began if they "result[ed] from open and obvious dangers only in the event of actual knowledge of the danger *and* actual knowledge that he cannot rely on the stevedore to remedy the situation. He is not held to a duty to discover the condition or to anticipate its danger." *Id.* at 1038-39 (empahsis in original)(footnote omitted).

The *Futo* court thus concluded that "[t]o impose a duty to intervene on the shipowner, respecting dangers not created by it which are obvious to the stevedore's employees and arising during and in the area of the stevedore's operations, *something more* is required than the mere shipboard location of the dangerous situation and the shipowner's knowledge of it." 742 F.2d at 215 (emphasis in original). Although the court refused to make a blanket rule, it stated that the extra requirement may sometimes "be satisfied if the accident is caused by a defedtive condition of the ship itself, its gear, or equipment." *Id.* (noting the language of *Scindia* and *Lewis*). A distinction between defects in the ship itself and its gear, and defects not directly related to the ship, is logical since

the owner is primarly responsible for the ship, gains the most from its proper maintenance, and can usually best comprehend the danger from a defect in the ship, its gear or equipment. *Id.*

Scindia, therefore, requires the existence of two basic conditions for the imposition of the shipowner's duty to intervene—the shipowner's actual knowledge of a danger to a longshoreman, and the shipowner's knowledge that the longshoreman's employer is not acting reasonably to protect its employees from that danger. 451 U.S. at 175-76. The *Futo* court outlined considerations that pertain to the existence of these basic conditions: whether the danger was open and obvious; whether the danger was located within the ship or ship's gear; which party created the danger or used the defective item and was therefore in a better position to correct it; which party owned and controlled the defective item; whether an affirmative act of negligence or acquiesence in the use of the dangerous item occurred; and whether the shipowner assumed any duty with regard to the dangerous item. 742 F.2d at 218, 221.

IV

[4] We now turn to the principles of law relevant to the slip owner's appeal. General maritime law allows the survivors of a decedent to recover damages the decedent could have recovered but for his death. *See Moragne v. Sates Marine Lines, Inc.* 398 U.S. 375 (1970)(recognizing a wrongful death action under general maritime law); *Azzopardi v. Ocean Drilling & Exploration Co.,* 742 F.2d 890, 893 (5th Cir. 1984)(acknowledging extension of *Moragne* principles by circuit courts to encompass a survival action under general maritime law); *Law v. Sea Drilling Corp.* 523 F.2d 793, 798 (5th Cir. 1975))("there is a federal maritime

cause of action for death on ... any navigable waters—and it can be enforced in any court."). Two requirements are necessary to establish admiralty jurisdiction for a maritime tort case—negligent conduct on navigable waters that causes harm and a significant relationship between that wrong and maritime activity. *Executive Jet Aviation, Inc. v. Cleveland,* 409 U.S. 249 (1972); *Sohyde Drilling & Marine Co. v. Coastal States Gas Producing Co.,* 644 F.2d 1132 (5th Cir.), *cert. denied sub nom Valero Energy Corp. v. Sohyde Drilling & Workover, Inc.* 454 U.S. 1081 (1981); *Kelly v. Smith,* 485 F.2d 520 (5th Cir. 1973), *cert. denied sub nom. Chicot Land Co. v. Kelly,* 416 U.S. 969 (1974); *see also Richardson v. Foremost Ins. Co.,* 641 F.2d 314 (5th Cir.)(the maritime activity need not be exclusively commercial), *aff'd* 454 U.S. 813 (1981). A wrong that begins on land but results in harm on navigable waters may constitute a maritime tort if these requirements are met. *See, e.g., Kamani v. Port of Houston Auth.,* 702 F.2d 612, 613 (5th Cir. 1983)(longshoreman aboard vessel on navigable waters who was injured while trying to escape a descending land-based crane established a maritime case); *Kelly,* 485 F.2d at 521-26 (land occupiers on shore who shot at and injured deer poachers fleeing in boat on Mississippi River were liable for a maritime tort).

[5] General principles of negligence guide the analysis of a maritime tort case. *Daigle v. Point Landing, Inc.,* 616 F.2d 825, 827 (5th Cir. 1980))(citation omitted). A defendant owes a plaintiff a duty of ordinary care, which includes a duty to warn only of harm that is reasonably forseeable. *Daigle,* 616 F.2d at 827. The circumstances of the danger and the defendant's knowledge of the risk determine the required degree of care. *Id.* (quoting 57 Am.Jur.2d *Negligence* § 72 (1971)).

V

On review of the denial of both motions for directed verdict and for judgment notwithstanding the verdict, we must view all of the evidence "in the light ... most favorable to the party opposed to the motion." *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969)). Judgment notwithstanding verdict is proper "[i]f the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict." *Id.*

A

[6] *Scindia*, as we have construed it, supplies the appropriate guidelines for our review of the evidence dispositive of the vessel owners' liability here since this case concerns the death of a longshoreman while directly engaged in ship repairs due to the alleged negligence of the vessel. An analysis of these facts under *Scindia* indicates that the vessel owners did not breach any duty they owed to Bodd under § 905(b). The record contains no evidence of negligence sufficient to sustain the jury's verdict.

[7] First, as *Scindia* requires, the vessel owners provided Bodd with a reasonably safe work place and told Bodd as much as they knew about the condition of the propeller. The owners of the CHERAMIE BO-TRUC #11 employed Martech as an expert independant contractor, whose employees were required to have skills which neither CHERAMIE nor Transocean employees possessed, to perform a hazardous activity. Although the muddiness of the water and presence of debris in the slip was apparent to all observers, the owners and their employees could not know the underwater condition of the slip, the extent of damage

to the propeller, and the risks that an underwater repair of the propeller (a wheel job) would necessitate. Only the expert diver, even a certified diver who was at the outset of his professional career, could make those determinations. The owners had to rely on his reasonable care in doing so.

The uncontroverted evidence showed that the vessel owners had used this slip four or five times in the past without encountering any difficulties, and that divers had performed wheel jobs in this slip without problems. This slip was adjacent to the slip belonging to Bodd's employer, Martech. Martech employees often performed wheel jobs. Before he made the first dive, Bodd knew the right propeller was so fouled that the starboard engine had shut down. He agreed to make the inspection dive even though conditions in the slip required that he set up his diving station sixty feet from the place where it would normally be positioned. After the inspection dive, Bodd did not report that he had encountered hazardous conditions below the surface. Rather, he told the captain of the vessel that the water at the stern of the boat was at a good depth for him to make the repairs. He did not request a relocation of the vessel into another slip or dry dock. He continued to make dives even through his air hose became entangled with debris on the bottom of the slip. The owners knew that Bodd was encountering difficulties with his equipment but they had no way of knowing that Bodd could not perform this wheel job with appropriate safety.

Appellees suggest that the CHERAMIE owners negligently failed to provide Bodd with a safe workplace because they moored the vessel so loosely that the nearby passage of other vessels caused it to move, and that this movement contributed to Bodd's perilous circumstances and death. The record contains no evidence that any vessel passed by the Transocean slip during or around the time of Bodd's final dive. This suggestion adds only speculation.

[8] The owners of the CHERAMIE did not breach any duty imposed on them by *Scindia* under § 905(b) to warn Bodd of unsafe conditions or to make them safe. A shipowner need not protect a longshoreman engaged in ship repairs "from risks that were inherent in the carrying out of the contract." *West v. United States,* 361 U.S. 118, 123 (1959)(employee of contractor to whom ship had been totally turned over for an extensive overhaul was injured while performing repairs). "[A] ship may not be found negligent merely because a condition of the ship that requires repair or inspection injures the person hired to inspect or repair that condition." *Stass v. American Commercial Line, Inc.,* 720 F.2d 879, 883 (5th Cir. 1983)(barge was not liable for injuries of employee of company hired to repair hull and grain doors due to slippery sprouted grain on deck and defective grain door because company was hired to inspect and repair that door and because cleaning the areas to be repaired was part of company's routine procedure)(quoting *Hill,* 674 F.2d at 452 n.5).

Appellees argue that the underwater condition of the slip was the defect that caused Bodd's death and for which appellants are responsible. Although that condition is not the defect Martech was hired to correct, the above principles are analogous. Every underwater condition entails some hazard to a diver. When the water is opaque, the diver is the only person who can know whether the hazards present make safe diving impossible. Bodd was sent to this job because he was an expert in underwater repair. He had special skills and equipment that allowed him to work underwater while other repairmen could not. Appellants could not make safe the underwater conditions in which Bodd was specially hired to work and for which he was specially trained, nor could they have a duty to warn him of conditions which they could not know about unless

someone in Bodd's profession made an inspection dive and told them about those conditions. Bodd's inspection dive supplied him with unique information about conditions under the water that were unknown and unknowable to the vessel owners. An inspection dive is a common procedure and its purpose is to determine whether an underwater repair job is possible. Runnels and Gaspard relied on the diver to make that determination.

Similarly, the vessel owners had no duty to intervene under *Scindia*. Since no contract, custom, or positive law required the owners to intervene and stop Bodd from attempting to repair the fouled propellers underwater, they had a duty to do so only if they knew the underwater conditions presented a danger to Bodd and that he was acting unreasonably in his continued attempts to accomplish the repairs under those conditions. The vessel owners did not possess this requisite knowledge.

We have held that the "[m]ere persence of the vessel's crew on the ship ... does not prove knowledge of the hazardous condition." *Hill*, 674 F.2d at 450 (quoting *Stockstill v. Gypsum Transp.*, 607 F. 2d 1112, 1117 (5th Cir. 1979), *cert. denied*, 451 U.S. 969 (1981)). Similarly, knowledge that the condition or even a defect exists, does not imply knowledge that the condition is dangerous. *Cf. Futo*, 742 F.2d at 220 ("Knowledge that the condition of an object renders it dangerous *if* used in a particular way or under particlar circumstances does not of itself necessarily evidence the requisite knowledge of actual danger.")(emphasis in original)(citing *Wild v. Lykes Bros, S.S. Corp.*, 734 F.2d 1124 (5th Cir. 1984)).

The owners of the CHERAMIE knew the slip water was muddy and that debris was floating in the slip. However, they did not know both propellers were entangled

until Bodd made his inspection dive. The owners knew Bodd was having difficulty with the repair work because he made repeated unsuccessful dives accompanied by radio complaints to his tender that his air hose was tangled with debris. They also knew Bodd, the expert diver, continued to make subsequent dives. They knew he made no complaint or observation to them that these difficulties were life-threatening or extra-hazardous. Neither observation of Bodd's difficulties nor knowledge of his complaints to his tender constituted actual knowledge on the part of CHERAMIE of danger to Bodd, or that he was acting unreasonably in his repeated attempts to repair the ship.

[10] An analysis of the facts under the factors emphasized by the Fifth Circuit in *Futo* further supports the conslusion that the vessel owners were not negligent in this case. The evidence does not clearly demonstrate what condition or event actually or predominantly caused Bodd's death. The debris in the slip, the missing regulator, Bodd's own actions in shucking his mask and life line are all possible factors. Although the fouled propellers may have presented a danger to Bodd, that defect was the one he was hired to correct and the vessel is not liable for injuries due to it. *See West,* 361 U.S. at 123; *Stass,* 720 F.2d at 883; *Hill,* 674 F.2d at 452. The defect which allegedly caused Bodd's death in this case, and for which appellees claim CHERAMIE is liable, was the underwater situation in which Bodd had to do his work. As in *Scindia, Lewis,* and *Helaire,* this defect was not a part of the ship's normal gear which the owner created or controlled. The district court noted that the vessel owners controlled the decision regarding *where* repairs should be conducted. They decided to request that Bodd attempt the wheel job in the slip rather than dry-docking the vessel. The chosen underwater work place, however, was the domain of the expert diver. Bodd,

the independent contractor, decided whether he would make the initial inspection dive. He was not ordered, directed or even requested to continue over protest or after notice that to do so would be dangerous. By choosing to proceed, Bodd determined to attempt the repairs and to make every subsequent dive including the fatal one. The expert diver controlled this decision, not the vessel owner. The defect was not a part of the ship or ship's gear, but was a condition directly related to the diver's expertise, underwater work. The facts of this case indicate that the vessel owners breached no duty which they owed to Bodd under § 905(b).

B

[11] The facts also demonstrate that the slip owner did not violate the duty of ordinary care it owed to Bodd under general maritime law. Transocean had a duty to warn Bodd only of dangers that were reasonably foreseeable. *Daigle v. Point Landing, Inc.*, 616 F.2d at 827. The record indicates that Transocean neither knew nor had reason to foresee that performance of a wheel job in its slip might endanger a diver. Uncontroverted evidence showed that divers had performed wheel jobs in this slip without problems. The muddiness of the water and the floating debris in the slip were obvious conditions. [Bodd, the underwater expert, was the only party who knew that conditions beneath the surface presented danger to a diver performing an underwater wheel job.] The presence of Transocean employees near the slip at the time of Bodd's dives did not constitute knowledge of his danger. *See Daigle*, 616 F.2d at 828 (towboat master's ability to see actions of plaintiff did not establish a duty to warn plaintiff). Transocean had no duty to warn Bodd of conditions [which it had no reason to know were dangerous.]

VI

The evidence is not sufficient to support the verdicts against either appellant. Since we reverse on the negligence issue, we need not address the other issues CHERAMIE and Transocean raise—whether Starns was appropriately qualified as an expert; whether the awards for conscious pain and suffering, for loss of society, and for punitive damages were erroneous or excessive; and whether, as a matter of law, punitive damages are awardable in an action brought under § 905(b).

The judgments appealed from are reversed and the cause is remanded with directions to enter judgment for defendants.

REVERSED and REMANDED WITH DIRECTIONS.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-4452

DOLORES BODD CASACELI, Individually and as representative of succession of Joseph Stanley Bodd, ETC.,

Plaintiff-Appellees,

versus

MARTECH INTERNATIONAL, INC., ET AL.,

Defendants,

TRANS OCEAN CONTRACTORS, INC.
and CHERAMIE BO TRUC #11, INC.,

Defendants-Appellants.

Appeal from the United States District Court for the Western District of Louisiana

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ON PETITION FOR REHEARING
(December 11, 1985)

FILED DECEMBER 11, 1985

Before CLARK, Chief Judge, RANDALL and JOLLY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby **(DENIED)**.

ENTERED FOR THE COURT:

/s/ Clark

United States Circuit Judge